Whitehall Packing Company, Inc. and W.P.C., Ltd. *and* United Food and Commercial Workers International Union, AFL-CIO, Local Union No. 73[1] and General Drivers and Helpers Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party in Interest. Case 18-CA-6036

July 24, 1981

DECISION AND ORDER

On December 11, 1980, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found that Respondent acted unlawfully in shutting down operations of its *alter ego*, W.P.C., Ltd., at the Eau Claire, Wisconsin, facility without notifying the Union. This finding is too broad. For the reasons set forth by the Administrative Law Judge, we agree that Respondent was obligated to bargain with the Union both over the decision to transfer unit work to W.P.C. and over the effects of that decision. The subsequent shutdown of W.P.C., however, was an economically motivated complete cessation of business. The decision to shut down, therefore, was not a mandatory subject of bargaining. However, the obligation to afford the Union an opportunity to discuss the impact and effect of the closing on the former Whitehall bargaining unit employees remained. *Merryweather Optical Company*, 240 NLRB 1213, 1214–15 (1979); *Stagg Zipper Corp., as successor to Stagg Tool & Die Corp., Bosch Wire Co., Inc., and Slide Fastener Tape Co., Inc.*, 222 NLRB 1249 (1976). With that clarification, we affirm the Administrative Law Judge's conclusion regarding the refusal to bargain over the shutdown of W.P.C.

THE REMEDY

The Administrative Law Judge, finding that it would not be unduly burdensome for Respondent to resume operations at its Whitehall, Wisconsin, facility with the exception of the "kill floor," recommended that such a partial resumption be ordered. He also recommended that the locked-out Whitehall employees be made whole from the date Respondent commenced operations at W.P.C., Respondent's *alter ego*, until the occurrence of certain conditions after the date of his Decision. W.P.C., however, went out of business on April 25, 1979, and thereafter liquidated its assets, and there is no evidence that it closed for unlawful reasons or that its operations were transferred elsewhere. We find it inappropriate to order resumption of this operation which has shut down permanently for economic reasons. Cf. *Bridgford Distributing Co.*, 229 NLRB 678, 679 (1977). Cf. also *N. C. Coastal Motor Lines, Inc.*, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976). We also find that, even though the Whitehall employees were refused employment at W.P.C. for unlawful reasons, they nevertheless would have been terminated for nondiscriminatory reasons when W.P.C. closed, and that such a presumed occurrence pretermits their backpay entitlement. See *Bridgford Distributing Co., supra* at 680.

It remains to devise remedies that are appropriate to the unfair labor practices committed in light of the economic circumstances. In order to make the Whitehall bargaining unit employees whole for the unilateral transfer of operations to W.P.C., and Respondent's discriminatory failure to offer them employment and refusal to hire them at W.P.C., we shall require Respondent to make them whole for any loss of wages or other benefits they may have suffered between November 6, 1978, and April 25, 1979 (the dates on which W.P.C. commenced operations and shut down, respectively), as a result of the unfair labor practices. The identity of the employees entitled to backpay, as well as the amounts due, are questions to be resolved in a compliance proceeding. *Ramos Iron Works, supra* at 906.

Inasmuch as the transfer of operations to W.P.C. has been subsumed by the closing of all of Respondent's facilities, including W.P.C., we do not find it appropriate to order Respondent to bargain over the decision to transfer. *Brockway Motor Trucks, Division of Mack Trucks, Inc.*, 251 NLRB 29, 32–33 (1980). It is necessary and appropriate, however, to order bargaining over the effects of the decision to transfer operations and of the later

[1] The name of the Charging Party has been amended in accordance with fn. 2 of the Administrative Law Judge's Decision.

[2] While not expressly excepting to the Administrative Law Judge's credibility findings, Respondent has advanced certain arguments that are based on testimony the Administrative Law Judge discredited. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] We agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by failing to offer employment at W.P.C., Ltd., its *alter ego*, to its locked-out employees for the reasons set forth in *Ramos Iron Works, Inc. and Rasol Engineering*, 234 NLRB 896, 904–905 (1978), and cases cited therein, as well as for the reasons stated by the Administrative Law Judge.

decision to shut down completely. *Burgmeyer Bros., Inc.*, 254 NLRB 1027 (1981). Accordingly, in order to insure meaningful collective bargaining and to effectuate the purposes of the Act, we deem it necessary to require Respondent to bargain with the Union concerning these subjects, and shall include in our Order a limited additional backpay requirement designed to recreate in some practicable manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for Respondent. Thus, Respondent shall pay employees backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of Respondent's operations on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum to any of these employees exceed the amount he or she would have earned as wages from April 25, 1979, the date on which Respondent terminated its operations, to the time he or she secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ.[4] Interest on all backpay awarded herein shall be paid in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[5]

To further effectuate the policies of the Act which Respondent challenged by its violations of Section 8(a)(3) as well as of Section 8(a)(5) and (1), Respondent shall be required to establish a preferential hiring list of all terminated unit employees following the system of seniority, if any, customarily applied to the conduct of Respondent's business, and, if Respondent ever resumes operations anywhere in the Whitehall, Wisconsin, area, it shall be required to offer these employees reinstatement. If, however, Respondent resumes its Whitehall operations, Respondent shall be required to offer unit employees reinstatement to their former or substantially equivalent positions.[6]

Furthermore, in view of the fact that Respondent is no longer in operation and its former employees may be in different locations, we shall order Respondent to mail each of its employees employed on the date it ceased operations copies of the attached notice signed by Respondent.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Whitehall Packing Company, Inc., Whitehall, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing and failing to bargain with United Food and Commercial Workers International Union, AFL–CIO, Local Union No. 73, as the exclusive bargaining representative, over such decisions as transferring unit work to W.P.C., Ltd., as well as the effects of such decisions and the decision to shut down W.P.C., Ltd., concerning employees in the following appropriate unit:

> All production and maintenance employees employed by Whitehall Packing Company, Inc., but excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Refusing to offer opportunities for positions of employment at W.P.C., Ltd., or such other *alter ego* corporate entity to avoid dealing with the above-named Union, thereby discouraging membership in said Union.

(c) Refusing to hire employees for positions at W.P.C., Ltd., to avoid dealing with the above-named Union, thereby discouraging membership in said Union.

(d) Preserving a lockout by creating and operating an *alter ego* corporate entity to avoid dealing with the above-named Union, thereby discouraging membership in said Union.

(e) Recognizing or supporting General Drivers and Helpers Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization other than the above-named Union, as the exclusive collective-bargaining representative of its employees or those of any *alter ego* corporate entity such as W.P.C., Ltd.,

[4] *Transmarine Navigation Corporation and its subsidiary, International Terminals, Inc.*, 170 NLRB 389 (1968); *Burgmeyer Bros., Inc., supra* at 1028–29.

[5] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[6] *Drapery Manufacturing Co., Inc., and American White Goods Company*, 170 NLRB 1706 (1968); *Burgmeyer Bros., Inc., supra.*

unless and until it is certified by the National Labor Relations Board.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make the terminated employees whole in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Upon request, bargain collectively with the above-named Union with respect to the effects on its employees of its decisions to transfer unit operations to W.P.C., Ltd., and to shut down W.P.C., Ltd., and reduce to writing any agreement reached as a result of such bargaining.

(c) Establish a preferential hiring list of all employees in the appropriate unit following the system of seniority, if any, customarily applied to the conduct of Respondent's business, and, if operations are ever resumed anywhere in the Whitehall, Wisconsin, area, offer reinstatement to those employees. If, however, Respondent were to resume its operations at the Whitehall facility, it shall offer all those in the appropriate unit reinstatement to their former or substantially equivalent positions.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in checking compliance with this Order.

(e) Mail a copy of the attached notice marked "Appendix"[7] to each employee in the appropriate unit who was employed by Respondent at its Whitehall facility immediately prior to Respondent's lockout on August 12, 1978. Copies of said notice, on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be mailed immediately upon receipt thereof, as hereinabove directed.

(f) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed in all other respects.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse and fail to bargain with United Food and Commercial Workers International Union, AFL-CIO, Local Union No. 73, as the exclusive bargaining representative, over such decisions as transferring operations to W.P.C., Ltd., as well as the effects of such decisions and the decision to shut down W.P.C., Ltd., concerning employees in the following unit:

> All production and maintenance employees employed by Whitehall Packing Company, Inc., but excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to offer opportunities for positions of employment at W.P.C., Ltd., or such other *alter ego* corporate entity to avoid dealing with the above-named Union, thereby discouraging membership in said Union.

WE WILL NOT refuse to hire employees for positions at W.P.C., Ltd., to avoid dealing with the above-named Union, thereby discouraging membership in said Union.

WE WILL NOT preserve a lockout by creating and operating an *alter ego* corporate entity to avoid dealing with the above-named Union, thereby discouraging membership in said Union.

WE WILL NOT by ourselves or under the guise of another company recognize or support General Drivers and Helpers Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization other than United Food and Commercial Workers International Union, AFL-CIO, Local Union No. 73, as the exclusive collective-bargaining representative of our employees or those of any *alter ego* corporate entity such as W.P.C., Ltd., unless and until it

is certified by the National Labor Relations Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively with Commercial Workers Local 73 concerning the effects on our employees of our decision to transfer operations to W.P.C., Ltd., and subsequently to shut down W.P.C., Ltd., and WE WILL reduce to writing any agreement reached as a result of such bargaining.

WE WILL make the terminated employees whole for any loss of wages or other benefits suffered as a result of our discrimination against them, plus interest.

WE WILL establish a preferential hiring list of all terminated employees in the bargaining unit following the system of seniority, if any, customarily applied to the conduct of our business, and, if we resume operations anywhere in the Whitehall, Wisconsin, area, we shall offer these employees reinstatement. If, however, we resume our operations at the Whitehall facility, said unit employees shall be offered reinstatement to their former or substantially equivalent positions.

WHITEHALL PACKING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge: This case was heard in Eau Claire, Wisconsin, on October 15–17 and November 27–29, 1979. On October 25, 1978, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, Local Union No. 73 (herein called the Union), filed charges and on July 2, 1979, filed an amendment thereto alleging that Whitehall Packing Company, Inc. (herein called Whitehall Packing or Whitehall), and W.P.C., Ltd. (herein called W.P.C.), engaged in certain acts and conduct violative of Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). The aforenoted charges and the amendment thereto gave rise to a complaint and notice of hearing which was issued on July 31, 1979.

The thrust of the complaint is that on or about October 12, 1978, Whitehall created W.P.C. (Whitehall and W.P.C. are herein jointly called Respondent), which Company operated as an *alter ego* at a facility in Eau Claire, Wisconsin, approximately 40 miles from the Whitehall facility. In this connection W.P.C. failed to offer employment to Whitehall employees who had all been locked out approximately 2 months earlier. Further, on or about November 6, 1978, Respondent discharged Whitehall's locked-out employees contemporaneously with the commencement of operations at the leased facility in Eau Claire. It is alleged that Respondent, by the aforenoted acts and conduct, violated Section 8(a)(3) and (1) of the Act. In addition, it is alleged that W.P.C. accorded recognition to and bargained with General Drivers and Helpers Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Teamsters) at a time when it was obligated to recognize and bargain with the Union as the exclusive bargaining representative of its employees, and that Respondent thereby violated Section 8(a)(1) and (2) of the Act. It is also alleged that Whitehall failed and refused to bargain with the Union over the creation of W.P.C. and, in connection therewith, the leasing of the boning facility in Eau Claire, Wisconsin, then later the commencing of boning operations at said facility, and then still later the ceasing of said boning operations, and that Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Respondent filed an answer conceding, *inter alia*, jurisdictional facts, but denying that W.P.C. was Whitehall's *alter ego* or that both companies comprised a single employer within the meaning of the Act, and denying that it committed any unfair labor practices.

Issues

The principal issues are:

1. Whether Whitehall and W.P.C. comprised a single employer within the meaning of the Act with W.P.C. evolving as the *alter ego* of Whitehall.
2. Whether Respondent unlawfully refused to hire former Whitehall employees for employment with W.P.C.
3. Whether Respondent was obligated to offer employment at W.P.C. to Whitehall employees.
4. Whether Respondent, by failing and refusing to offer employment at W.P.C. to Whitehall employees, thereby unlawfully discharged said Whitehall employees.
5. Whether Respondent was obligated to bargain with the Union over the decision to create W.P.C. and the effects thereof.
6. Whether Respondent accorded recognition to and bargained with the Teamsters at a time when it was obligated to bargain collectively with the Union as the exclusive collective-bargaining representative of W.P.C.'s employees.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the post-hearing briefs, I find as follows:

I. JURISDICTION

Whitehall is a Wisconsin corporation and at all times material herein it has been engaged in the slaughter, boning, packing, and nonretail sale and distribution of beef and related products at a facility located in the city of Whitehall in the State of Wisconsin. In connection with the aforenoted business operations, and during a relevant 12-month time frame, Whitehall, *inter alia*, derived revenue in excess of $50,000 directly from the sale and shipment of its products, goods, and materials to points

outside the State of Wisconsin. It is admitted, and I find, that Whitehall is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

W.P.C. is a Wisconsin corporation and at all times material herein it maintained a facility in the city of Eau Claire in the State of Wisconsin where it was engaged in the boning, packing, and nonretail sale and distribution of beef and related products. In connection with the aforenoted business operations and during a relevant time frame, W.P.C. derived revenue in excess of $50,000 directly from the sale and shipment of its products, goods, and materials to points outside the State of Wisconsin. It is admitted, and I find, that W.P.C. is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1]

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted, and I find, that Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union No. 73,[2] is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

It is admitted, and I find, that General Drivers and Helpers Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Whitehall has recognized and bargained collectively with the Union as the representative of its production and maintenance employees since 1964, and has negotiated with the Union a series of successive contracts, the last of which by its terms was effective from May 9, 1977, to July 9, 1978. (G.C. Exh. 48.) On May 30, 1978,[3] the parties commenced negotiations for a new agreement and exchanged proposals. Overall, the parties conducted approximately 22 sessions, the last of which was held on February 13, 1979, without ever reaching an agreement on a new collective-bargaining contract.

Early in the negotiations, Whitehall bargaining representatives made it known that the Company was experiencing serious financial difficulties and expected relief from the Union, particularly with regard to the wage package for the new contract. Thus, at the fifth negotiating session on June 28, Hyman Ramis, then vice president of operations, proposed, *inter alia*, that the Union accept a 10-percent decrease in wages over the first 18 months of the new contract. (G.C. Exhs. 27 and 103.) Ramis raised for the first time the possibility that the Company might discontinue operations asserting that this was something the Company did not want to do, but would if so compelled. (G.C. Exh. 27.) In any event the Company announced at the meeting that there would soon be a 1-week layoff. This announcement was followed by a mailgram dated June 30 sent by Ramis to the Union's business representative and negotiator, Paul Petranech, providing formal notice to the Union that due to economic conditions all hourly employees would be laid off for 1 week commencing July 1. (G.C. Exh. 8.)

In order to verify the accuracy of the Company's representations *vis-a-vis* its economic plight, the Union asked to examine not only Whitehall's financial books but also those of its wholly owned subsidiary, Meilman Food Industries, Inc. (herein called M.F.I.).[4] The Company provided the financial books of Whitehall but denied the Union access to the financial reports of M.F.I. While the furnished financial material disclosed that Whitehall had suffered economic losses, the Union contended that it still needed the financial reports of M.F.I. in order to determine the magnitude of Whitehall's economic decline. The Union pressed the Company for the financial records of M.F.I. pointing out, *inter alia*, that the two companies had filed consolidated financial reports and joint tax returns. The Company refused, maintaining that these companies were separate entities for accounting purposes.

The collective-bargaining agreement under which the parties were then governed by its terms expired on July 9. By letter dated July 11, Ramis wrote to employees explaining that the Company was proposing, *inter alia*, a 10-percent hourly wage reduction for 18 months and a reduction in certain fringe benefits because of substantial economic losses, and asserting that "there is a serious question as to whether or not the Company can survive . . . that these are steps that are absolutely necessary." (G.C. Exh. 11.) The parties next met consecutively on July 19 and 20 with both sides making some modifications to the proposals. The Company, for example, reduced the time period for the 10-percent wage cut from 18 months to 12 months. The Union, on the other hand, scaled down a number of its proposals and expressed a willingness to forgo any retroactive pay. (G.C. Exhs. 28 and 103.) Within a day or two, the union membership voted to reject the Company's proposals. The Company was also notified by the Wisconsin Employment Relations Commission that the Union had filed with it a notice of intention to strike on July 24 and that under Wisconsin statutes a union cannot strike for 10 days after the filing of such notice. (G.C. Exh. 12.) The 10-day period was to expire as of midnight, August 3.

At the August 1 bargaining session Whitehall's attorney, Gerald O'Flaherty, requested and obtained from the Union assurances of an additional 72-hour notice of any

[1] The relationship between Whitehall and W.P.C. *vis-a-vis* single employer and *alter ego* will be treated more fully *infra*.

[2] Several months before the instant hearing opened, Amalgamated Meat Cutters and Butcher Workmen of North America merged with the Retail Clerks Union and formed United Food and Commercial Workers International Union. The Charging Party Union is now known as United Food and Commercial Workers International Union.

[3] All dates hereinafter refer to 1978 unless otherwise indicated.

[4] M.F.I. maintains and operates its principal facility in Sioux Falls, South Dakota, and is engaged in the same business as Whitehall, to wit, the slaughter and boning of beef and related products. The record discloses, *inter alia*, substantial contact between the two companies and that they share some functional integration. However, the production and maintenance employees of M.F.I. are represented by another local of the United Food and Commercial Workers International Union.

strike. Henry Dubinski, financial secretary of the Union, informed the company negotiators at this session that, although the union bargaining team had been given strike authority, they were not interested in calling a strike at that time, but would rather continue its efforts to reach an agreement on a contract. (G.C. Exhs. 30 and 103.)

The parties met again on August 3 and then again on August 10 with no futher progress toward reaching an agreement. At the August 3 meeting Ramis declared that the parties were at an impasse. (G.C. Exh. 103.) With regard to the August 10 meeting each party ascribed to the other responsibility for calling the lockout which became effective 2 days later. The meeting was held in La Crosse Wisconsin, with the Union represented by International Vice President Irving Stern, Dubinski, and Petranech and the Company by Daniel Meilman (president and a principal owner), Ramis, and Pat Trussoni, a consultant to Vice President Ramis. Petranech testified that Meilman announced that the employees would be locked out effective August 12. (See also G.C. 103.) According to Meilman, it was Stern who first proposed the lockout in a phone conversation the previous day and repeated this suggestion to him privately on August 10.[5]

The parties did not resume negotiations until August 29 and again there was no significant progress toward reaching an agreement. The parties are in dispute with regard to what was accomplished at the next meeting on September 1, which was conducted in the office of Union International Vice President Wendell Olson. On that occasion, Olson and Ramis removed themselves from the other negotiators for several hours to discuss the contract privately. According to the Union, the one-on-one session resulted in agreement on most of the issues (approximately 30) with only matters involving wages, a guaranteed workweek, and sick days still unresolved. Ramis, on the other hand, testified that he and Olson discussed only the major issues and that they had not agreed on anything.[6]

At later bargaining sessions, Meilman expressed a sense of urgency in reaching a quick accord on a contract linking financing and the reopening of the plant to the approval by the banks of any new contract. The Union then proposed, *inter alia*, a 1-year freeze on wages, to which the Company countered by proposing a 6-month contract linking wages to productivity. At the October 5 bargaining session,[7] Meilman reserved little likelihood of the Company's ever resuming its kill floor operations even if the plant reopened, but indicated a willingness to integrate the kill floor employees with other employees on the basis of seniority. Meilman was scheduled to meet with banking representatives shortly and pressed for a response to the Company's proposal by October 8. Petranech told Meilman that he needed the proposal set forth in writing, but noted that on "such short notice" it would not be possible to assemble the union body for a vote. The following day the Company sent the Union a mailgram, the body of which in its entirety reads as follows (G.C. Exh. 20):

> This will confirm that the current company proposal is as follows:
>
> 1. 6/14/78 company proposal
> 2. 6 month contract
> 3. A profit sharing provision to be negotiated
> 4. In the event kill floor does not operate kill floor employees will be integrated as soon as is practicable into remaining operations.
>
> The foregoing is conditioned upon the approval and agreement of Citicorp Business Credit, Inc., providing sufficient working capital to fund the plant reopening.
>
> This is further conditioned upon union acceptance by 4 0'clock p.m. October 8, 1978.

The aforenoted mailgram was received by the Union on October 10. The Company's package for a new contract as outlined in the mailgram was rejected by the union body on October 17. The parties did not conduct another bargaining session until December 6 and then they met again in January and February 1979 without any progress toward an agreement. The Whitehall facility has not reopened.

As previously noted, during the months of September and October 1978, Whitehall representatives were actively negotiating the lease of another facility for boning operations. These negotiations were conducted with the Landy family (herein Landy), owners of Landy of Wisconsin (also known as Landy Packing Company), which operated, *inter alia*, a boning facility in Eau Claire, Wisconsin, some 42 miles from Whitehall. Landy Packing Company's (herein Landy Packing) production and

[5] While the testimony adduced by the General Counsel with regard to what transpired at the August 10 meeting was inconsistent and weak, I am persuaded and find on the entire state of this record that the decision to lock out was made solely by Respondent. According to Meilman, he made the decision to lock out on the basis of his phone conversation with Stern on August 9. Meilman testified that the only one on his staff that he informed of Stern's suggested lockout was O'Flaherty—not Ramis, not Trussoni. It was not until the afternoon of August 10 (the parties had a morning session) that Meilman assertedly first informed Ramis and Trussoni that the Union proposed the lockout. I find this account highly implausible noting, *inter alia*, that the Company sent a mailgram to the Union on August 9 advising it that employees "will be lockout" on August 12 as a result of the "bargaining impasse." (G.C. Exh. 13.) While Meilman, Ramis, and Trussoni largely corroborated each other *vis-a-vis* the August 10 session, I was unimpressed with the demeanor they displayed and found their testimony at times to be unresponsive and evasive, factors further tending to militate against their credibility. In any event, the General Counsel has not alleged nor does he now contend that Respondent engaged in "surface bargaining or that the lockout was impermissible under the circumstances."

[6] I do not rely on Olson's unsupported contention that all the so-called minor issues were eliminated or resolved. Firstly, it is noted that none of the items allegedly agreed to were reduced to writing. Secondly, it is noted that this meeting represented Olson's first appearance at the bargaining sessions. As such, in the circumstances of this case, I find in agreement with counsel for Respondent that it is unlikely that Olson achieved in several hours what had eluded the other union representative over several months. In any case, as noted previously, the General Counsel does not contend that Respondent was engaged in "surface bargaining," but, rather, contends that Respondent violated Sec. 8(a)(5) of the Act by subsequently creating W.P.C. and by other actions taken in connection therewith.

[7] Meilman, Ramis, and Whitehall's general counsel and treasurer, James Peters, were actively negotiating a lease for a new boning facility during the month of September. The October 5 session was the last meeting of the parties before Respondent created W.P.C. The articles of incorporation for W.P.C. were filed on October 9. (G.C. Exh. 46.)

maintenance employees and drivers employed at the Eau Claire facility had been represented by the Teamsters since 1973. The most recent contracts by their terms expired on September 30, 1978.[8] (G.C. Exh. 52, p. 13; G.C. Exh. 54, p. 15.) Around the end of January 1978, due to economic circumstances, Landy Packing began laying off certain production and maintenance employees employed at the Eau Claire facility and was then compelled to close its doors entirely approximately 1 month later.

During the last 2 weeks in September, David Dahl, business representative of the Teamsters, learned from Landy's attorney, Charles Sykes, that Landy was contemplating leasing the Eau Claire facility to W.P.C. Sykes also informed Dahl that W.P.C. wanted some contractual modifications. As noted above both Teamsters contracts, one covering production and maintenance employees and the other covering drivers and truck maintenance employees, terminated on September 30. On October 5, Dahl met Sykes at the airport in Minneapolis where they executed an agreement extending the recently expired contract another year with certain modifications that had been negotiated between W.P.C. and Landy. Further, the agreement contained a provision which reads as follows (G.C. Exh. 36):

> This Agreement which hereby incorporates by reference the agreement effective from 10-8-75 to 9-30-78 shall be made part of the lease between Landy of Wisconsin Inc. and any entity which shall lease the Eau Claire facility during October, 1978.

Over the next few weeks Dahl met with Ramis and Trussoni and negotiated further details relative to the modifications, including certain wage rates (G.C. Exh. 37).[9] On October 31 Dahl and Ramis executed an agreement whereby W.P.C., *inter alia*, expressly adopted the collective-bargaining agreement between Landy and the Teamsters, which by its terms had expired on September 30, 1978, but which on October 5 was extended for another year.[10]

On or abour November 2, the undated lease for the boning facility in Eau Claire was executed.[11] According to Meilman, Ramis, and Peters, Landy conditioned the lease on W.P.C.'s succeeding to Landy's contract with the Teamsters.[12] W.P.C. commenced operations at the leased facility on November 6.[13] W.P.C. did not renew the lease and ceased operations on April 25, 1979. (G.C. Exh. 41.)

B. *Discussion and Conclusions*

1. Single-employer and *alter ego* status

As previously noted, Whitehall, which at all times material herein was engaged in the slaughter of cattle and the boning and processing of beef and related products, locked out its employees on August 12, 1978. W.P.C., which was created approximately 2 months after the aforenoted lockout began, was engaged in the boning and processing of beef and related products but not the slaughter of cattle. The General Counsel's case turns first on the disputed allegation that Whitehall and W.P.C. comprised a single-employer relationship with the latter Company emerging as the *alter ego* of the former during the approximately 6 months in which W.P.C. operated under lease at Landy's boning facility in Eau Claire, Wisconsin.

In determining whether two or more business enterprises comprise a single-employer relationship within the meaning of the Act, some of the principal factors long considered relevant by the Board are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership. See *Sakrete of Northern California, Inc.*, 137 NLRB 1220, 1222 (1962), affd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965); *H. S. Brooks Electric, Inc., et al.*, 233 NLRB 889, 893 (1977). These factors are all present in a large degree *vis-a-vis* Whitehall and W.P.C. Thus, the record discloses, *inter alia*, that Whitehall and W.P.C. at all times material herein were substantially owned and controlled by the same individuals, that these same individuals determined labor relations for both Companies, and that these Companies in significant part were functionally integrated; i.e., virtually the entire W.P.C. managerial and supervisory corps continued to be carried on Whitehall's payroll. (Jt. Exh. 1.) For these reasons, as well as other factors noted with greater particularity below, I find that Whitehall and W.P.C. at all times material herein comprised a single-employer relationship within the meaning of the Act. I further find, for reasons stated below, that W.P.C. at all times material herein was in essence nothing more than a disguised continuance of Whitehall and, as such, constituted its *alter ego*.

The record discloses that at all times material herein the Meilman family, with Daniel Meilman as the dominant member thereof, substantially owned and controlled a number of interlocking corporate entities, including Whitehall, M.F.I.,[14] and W.P.C. At all times material herein W.P.C.[15] was a wholly owned subsidiary of

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[8] The Teamsters at first represented Landy Packing's production and maintenance employees and drivers in one bargaining unit. In 1976 the Teamsters executed a separate contract for the drivers and truck maintenance employees.

[9] W.P.C. agreed to resort to the Teamsters seniority list to recall former Landy employees. An advertisement appeared in the Leader-Telegram on October 14 for applicants stating that "previous seniority" at the Eau Claire facility "will be honored." (G.C. Exh. 21.)

[10] The agreement between W.P.C. and the Teamsters expressly eliminated any reference to "truckdriver." (G.C. Exh. 40, par. B.) Thus drivers were eliminated as unit employees. Instead, W.P.C. relied heavily on the trucking services of Whitehall Transport, Inc., a common carrier, whose principal owner is Daniel Meilman.

[11] The lease was by and between Landy and Landy, a partnership (lessor), and Whitehall, M.F.I., and W.P.C. (lessees), and covered a 6-month term commencing November 6 and terminating May 5, 1979. (G.C. Exh. 104.)

[12] Landy representatives did not testify.

[13] W.P.C. hired approximately 60 employees during its first 2 weeks of operation and all but a handful were former Landy employees. (G.C. Exh. 109.) At the peak of its operations, W.P.C. employed approximately 60 employees. Management and supervisory personnel were virtually the same for Whitehall and W.P.C.

[14] M.F.I. is not a named party in this proceeding. See also fn. 4 *supra*.

[15] Peters testified that W.P.C. was liquidated on or about July 1, 1979.

M.F.I., which in turn is and was at all times material herein a wholly owned subsidiary of Whitehall.[16] The board of directors for both Whitehall and M.F.I. are the same, to wit, the three Meilman brothers. The Meilman brothers also served as directors for W.P.C. and were later joined by Ramis, Peters, and Bipin Shukla, Whitehall's controller.[17] At all times material herein the officers for all three companies were the same. They were: Daniel Meilman, president; Myron Meilman, vice president; Hyman Ramis, vice president; Jack Meilman, secretary; and James Peters, treasurer. (G.C. Exh. 45.) Further, individuals employed in quality control and sales performed services for all three companies.[18] Still further, and as previously noted, virtually the entire managerial and supervisory corps at W.P.C. continued to be employed by Whitehall and carried on its payroll. (Jt. Exh. 1.)

In addition to the significant factors supporting a finding of common ownership and control as set forth above, the record also clearly established that W.P.C. emerged with substantially the same business purpose as Whitehall. Thus, both Companies were engaged principally in the business of boning and processing beef and related products.[19] While Whitehall was also involved in the slaughter of cattle (the kill floor operation), the record discloses that most of its approximately 225 production and maintenance employees were engaged in the boning operation. The slaughtering of cattle or the kill floor operation is further diminished in significance when it is noted that Respondent conveyed to the Union the unlikelihood of ever resuming that phase of the business even if the lockout ended and the Whitehall facility reopened. Insofar as the record discloses certain differences in the boning process at the two establishments, I find this was due mainly to the manner in which Landy (lessor) had initially set up the Eau Claire facility making it impractical for W.P.C. to use some of the Whitehall equipment. In any event, a variety of Whitehall equipment and office supplies were transferred and used by W.P.C. In this connection the record discloses that Respondent submitted the appropriate Federal forms to the U.S.D.A. for authority, *inter alia* , to utilize the existing stock of Whitehall. Of greater significance is that the end product was the same and that Whitehall employees were employed in the classifications and possessed the skills necessary to do the work at W.P.C.

The General Counsel contends, the record reveals, and I find that in creating W.P.C. Respondent was motivated by a desire to take advantage of that time of year when business in the meat industry was most profitable. Thus, Ramis testified in pertinent part as follows:

> And, the period of a year, September, October, November, the six-month cycle from then through April, say, of the following year has historically been a real good season for the meat business. You do a lot of government work.[20] It is a rarity that its not profitable. Well, we [the negotiators] were getting no place with making a deal with the Union at Whitehall . . . . So the decision was made to take and try and rent [the Eau Claire facility] for a short term and hopefully a long term if it worked.[21]

The conclusion is inescapable that W.P.C. was formed to fill the void left by Whitehall as a result of the lockout and that as such it served in the main as a disguised continuance of Whitehall. The two Companies could not coexist. According to Meilman, W.P.C.'s economic life was dependent on the labor situation at Whitehall remaining unchanged. Meilman explained the nature of the undertaking at W.P.C. as follows:

> It [the Eau Claire facility] was a turnkey operation. The cost of opening that facility and closing it would be rather insignificant. *Our intentions were that at any time we could find resolution to the contract negotiations with the Amalgamated Meat Cutters, we could close the W.P.C. facility because all we had [as] an ongoing reoccuring cost was the rent.* [Emphasis supplied.]

During the month of September, at a time when Whitehall negotiators were ostensibly searching in earnest for an accord with the Union, Respondent was also deeply involved in (1) negotiations with Landy (lessor) for the lease of the Eau Claire boning facility and (2) the formation of W.P.C., both of which were concealed from the Union. I reject Respondent's denial that W.P.C.'s "affiliation" with Whitehall was disguised. Counsel for Respondent relies on a chance verbal exchange between Meilman and Olson at a recess from negotiations on September 19. On that occasion, Olson told Meilman that he heard that the Company was "looking at another operation" and then questioned Meilman about it. Meilman responded, "At this point we're only accumulating discussions so it doesn't really pay to discuss the matter but we are looking at other facilities." Given the reluctance by Meilman to discuss the matter and noting that he merely stated that Respondent was looking at other facilities, I find that the Meilman-Olson exchange on September 19 falls far short of supporting

[16] The stock of Whitehall, the parent corporation, is owned by Daniel Meilman, Myron Meilman, and Jack Meilman (brothers), and Meilman Brothers (a partnership), Capital Investments, and More American Corporation. Capital and More American are both small business investment corporations.

[17] Ramis, Peters, and Shukla were all hired by Daniel Meilman and serve at his pleasure.

[18] The individuals in quality control were James Schwarzboff and Cathleen Brandt, and those in sales were Jerome Puchalla, Roy Anderson, Mike Apple, and David Schmidt.

[19] Ramis testified that the suppliers and customers for Whitehall and W.P.C. were basically the same. In addition, the parties stipulated, the record reveals, and I find that the customers for both Companies were substantially the same. Further, the record reveals that Whitehall Transport, Inc., a trucking enterprise principally owned by Daniel Meilman, performed the bulk of the shipments for the two Companies.

[20] This involved, *inter alia*, beef and juice under the national school lunch program. M.F.I. was the contracting entity in dealing with the Department of Agriculture on behalf of Whitehall. After Whitehall locked out its employees and shut down its operations, M.F.I. continued to bid for these same contracts as the contracting entity on behalf of W.P.C.

[21] In connection with Respondent's decision to create and operate W.P.C., I find that the record considered as a whole strongly supports the inference not only that it was motivated by a desire to benefit financially during the months traditionally profitable in the meat industry, but also that it aspired to eliminate the Union and embarked on a scheme in furtherance thereof as will be discussed *infra*.

Respondent's denial that W.P.C.'s affiliation with Whitehall was disguised. Meilman said nothing of the Eau Claire facility or that he was contemplating the formation of another company (W.P.C.). While the relationship was uncovered sometime after W.P.C. became operational, I find, in agreement with the General Counsel, that the Union was then presented with a *fait accompli* making illusory any attempt by the Union to bargain over the decision to create W.P.C. and related issues.

In sum, I find that Whitehall and W.P.C. comprised a single-employer relationship within the meaning of Section 2(2) of the Act and that at all times material herein W.P.C. served as a disguised continuance of Whitehall and its *alter ego*. See, e.g., *Rushton & Mercier Woodworking, Co., Inc., and Rand & Co., Inc.*, 203 NLRB 123 (1973); *Marquis Printing Corporation and Mutual Lithograph Company*, 213 NLRB 394 (1974); *Shield-Pacific, Ltd. and West Hawaii Concrete, Ltd.*, 245 NLRB 409 (1979); *H. S. Brooks Electric, Inc., supra* at 894.

2. The 8(a)(5) allegations; the obligation to bargain over the "decision" and "effects"

Having determined that W.P.C. was the disguised continuance of Whitehall and its *alter ego*, I find that in essence Respondent merely transferred unit work from the latter's facility in Whitehall to the former's leased facility in Eau Claire. Both enterprises were substantially owned and controlled by the same individuals and were involved in substantially the same work achieving the same final products but with different employees. The record clearly established that Whitehall employees were perfectly capable of performing the work at W.P.C. In fact, as conceded by Ramis, Whitehall employees possessed greater skills and experience than those at W.P.C. Further, it is noted, as testified by Trussoni, that in some cases W.P.C. hired employees for job functions for which they had no experience. In these circumstances I find that Respondent, by its failure to bargain with the Union over the decision to transfer the Whitehall business operations to Eau Claire, as well as the effects of that decision, violated Section 8(a)(5) and (1) of the Act. See, e.g., *Stone & Thomas*, 221 NLRB 573 (1975); *Bruce E. Kronenberger and Herbert Schoenbrod d/b/a American Needle & Novelty Company, Kentucky Manufacturing Company and Harrisburg Manufacturing Company*, 206 NLRB 534 (1973).

3. The 8(a)(3) allegations

a. *The offers of employment*

Having determined that W.P.C. was Whitehall's *alter ego* and that Respondent failed to meet its statutory obligations to bargain over the "decision" and "effects," the case now turns to Respondent's obligation to offer employment to Whitehall's employees at the time W.P.C. became operational.

Whitehall's employees were locked out on August 12. As noted previously, it is not contended that prior thereto Respondent had engaged in surface bargaining for a new contract or that the lockout initially was impermissible under the circumstances. However, Respondent's acts and conducts in dealing with the generally profitable fall and winter months in the context of its self-imposed lockout are in issue.[22] The record discloses that in effect Respondent made an end run around the lockout by creating W.P.C., an *alter ego*. This served not only to provide Respondent with the vehicle by which it could reasonably expect to operate profitably while still maintaining the lockout, but also to effectively eliminate the Union. To accomplish this result, Respondent decided to bypass Whitehall employees and looked elsewhere for a labor force to service W.P.C. It is alleged in these circumstances that Respondent, by not offering employment to Whitehall employees, independently transgressed Section 8(a)(3) and (1) of the Act. The General Counsel asserts, the record reveals, and I find that Respondent's unlawful motivation is shown by, *inter alia*, its determination to conceal from the Union that it was actually closing Whitehall, i.e., transferring its managerial and supervisory corps along with some equipment and office supplies to W.P.C., by its failing to provide a bargaining opportunity to the Union *vis-a-vis* the decision to create W.P.C. and its "effect," by its concealing and not disclosing the W.P.C. undertaking, by its "blanket refusal" to initially consider any Whitehall employees for jobs at W.P.C., and by its haste in according recognition to the Teamsters for the employees at W.P.C. even before that Company became operational.[23]

On the other hand, as Respondent correctly acknowledged in its brief, if an employer's conduct is "inherently destructive" of employee rights, proof of illegal motivation is not needed. The test as set forth by the Supreme Court in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), is as follows:

> First, *if it can reasonably be concluded that the employer's discriminatory [or coercive] conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.* Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain a charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [Emphasis supplied in part.]

Respondent, while conceding that Whitehall's action (the lockout and the opening of W.P.C.) is coercive, denies that such action intruded upon any employee rights as enumerated in Section 7 of the Act. In support thereof, Respondent notes the following factors: (1) W.P.C. was opened only for the duration of the White-

[22] According to Respondent, the Union suggested and supported the lockout creating a "hybrid situation" and thereby absolving Respondent from responsibility. For reasons noted previously, I have found that the lockout was attributable solely to Respondent. See fn. 5, *supra*.

[23] Ramis and Trussoni met and negotiated with Dahl of the Teamsters on several occasions during the month of October culminating in an agreement executed on October 31. (G.C. Exh. 40.) W.P.C. became operational on November 6. The bargaining relationship between W.P.C. and the Teamsters is alleged to independently violate Sec. 8(a)(2) of the Act and will be treated separately *infra*.

hall dispute; (2) Whitehall employees at all times had the option to return to work by accepting Whitehall's contract proposals; (3) Whitehall continued to recognize the Union as the bargaining agent of its employees, and (4) the record is devoid of evidence supporting any antiunion motivation in the opening of W.P.C. According to Respondent, the only impact of Whitehall's action was on the Union's bargaining position, to wit, to force acceptance of the employer's contract proposals. Respondent contends that so increasing the pressure on the Union to settle a labor dispute does not constitute an unfair labor practice, citing *N.L.R.B.* v. *John Brown, et al. d/b/a Brown Food Stores, et al.*, 380 U.S. 278 (1965); *Inter-Collegiate Press, Graphic Arts Division, etc., and Sargent Welch Scientific Company* v. *N.L.R.B.*, 486 F.2d 837 (8th Cir. 1973); *Ottawa Silica Company*, 197 NLRB 449 (1972).

I find that the aforenoted factors relied on by Respondent are not supported by the credible evidence and that the cases cited are distinguishable on their facts. For example, I am not persuaded that Respondent created W.P.C. with the limited intention of operating only for the duration of the labor dispute at Whitehall. Thus, Peter Solomakos,[24] onetime director of personnel, testified that Trussoni informed him about W.P.C.'s lease arrangement for 6 months with expectations as follows:

> [H]opefully they were going to try and make a success out of [the W.P.C. boning] operation . . . [and] tap the available meat cutter resource in that area. *And if [they] were successful . . . there was a strong possibility that they would renew that six month lease . . . [and] there was a potential of even purchasing that facility.* [Emphasis supplied.]

The foregoing revelations by Trussoni to Solomakos tend to suggest that Respondent had long-term designs regarding the Eau Claire facility dependent principally on the success of the W.P.C. undertaking rather than on the outcome of the labor dispute as contended by Respondent. Ramis largely confirmed as much stating that "the decision was . . . to try and rent [the Eau Claire facility] for a short term and hopefully a long term if it worked."

With respect to Respondent's assertion that Whitehall employees had the option at all times to return to work by agreeing to Whitehall's contract proposal, I find that this, too, is not established by the record. Unlike *Ottawa Silica Co., supra*, and *Inter-Collegiate Press, supra*, relied on by Respondent, the instant case involves the creation and operation of an *alter ego* enterprise at another facility some 40 miles distant. Assuming, *arguendo*, that the locked-out employees had agreed to Whitehall's contract proposal after W.P.C. emerged operational, Respondent was still faced with a 1-year contract with the Teamsters (G.C. Exh. 40) to say nothing of arrangements for the return of equipment and office supplies to Whitehall. It is noted that Respondent did not definitively represent to the Union that it would resume operations at Whitehall on acceptance of its contract proposal, but, rather, maintained that it would then first have to submit the contract to the banks for approval in the hope of attaining the necessary financing to resume operations. These factors strongly militate against any finding that Whitehall employees had "at all times" a viable "option" to return to work by merely accepting Respondent's contract proposal.

With regard to Respondent's representation that it continued to recognize the Union as the bargaining agent, I find this largely academic given Whitehall's failure to bargain over the decision to create W.P.C. and the effects flowing therefrom. This, coupled with the *alter ego* finding, tends to buttress the inference that Respondent's action was calculated to discourage union membership. Cf. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 312–313 (1965); *Ottawa Silica Co., supra.*

Finally, for reasons noted heretofore and on "the entire congeries of facts herein," I reject Respondent's contention that no evidence was introduced indicating antiunion motivation in opening W.P.C. See *Rushton & Mercier Woodworking Co., supra.*

In sum, I find that Respondent, by failing to offer employment to Whitehall employees at the time W.P.C. emerged operational, violated Section 8(a)(3) and (1) of the Act.

b. *The refusal to hire*

Having found that Respondent was obligated to offer employment to Whitehall employees at Eau Claire, but failed and refused to do so for reasons violative of Section 8(a)(3), I further find that at all times material herein Respondent for essentially the same reasons refused to hire Whitehall employees.

The record discloses that at least as early as October 14 W.P.C. had placed a help-wanted advertisement in the Eau Claire Leader-Telegram seeking to hire "skilled workers" for its meat boning operation in Eau Claire. (G.C. Exh. 21.) As noted previously, the Whitehall employees possessed the experience and skills to meet the requirements for employment at W.P.C. In all 10 locked-out Whitehall employees submitted applications for employment at W.P.C. (Jt. Exhs. 8A–K.) The first of these was Kenneth Burchell, who applied on October 15 (Jt. Exh. 8G) but was denied employment because Respondent admittedly adhered to the Teamsters seniority roster of former Landy employees.

According to Respondent, Landy made Teamsters recognition a condition to the lease and in furtherance thereof Respondent was obligated to honor the Teamsters seniority roster. I am unpersuaded, however, that Landy ever invoked Teamsters recognition as a condition as contended by Respondent. In this regard it is

[24] At Whitehall, Solomakos' duties included the responsibility for interviewing and screening applicants for employment and classification. It is alleged, Respondent admits, and I find that Solomakos, at all times material herein, was a statutory supervisor and agent of Whitehall. It is also alleged, but Respondent denies, that Solomakos was a statutory supervisor and agent of W.P.C. The record discloses that Solomakos received a $25 weekly salary increase as soon as W.P.C. became operational and that his responsibilities increased at W.P.C. He continued to recommend employees for hire, and Ramis conceded that these recommendations were followed. On the basis of the foregoing and the entire record, I find that Solomakos, *inter alia*, possessed the authority to effectively recommend applicants for employment and was a supervisor within the meaning of Sec. 2(11) of the Act and agent of W.P.C.

noted that the lease itself makes no reference to Teamsters recognition (G.C. Exh. 104).[25] Further, no Landy representative provided any corroborative evidence. In the circumstances of this case, noting particularly that I have otherwise found Respondent's witnesses unreliable regarding significant testimony, I reject Respondent's averment as not supported by the credible evidence.

In addition to Respondent's reliance on the Teamsters roster, Respondent offered several weak and unconvincing explanations for denying employment to other locked-out Whitehall employees who filed applications subsequent to Burchell. Thus, Trussoni testified that Daniel Paulson was rejected as a candidate for employment because he submitted a fraudulent application. (Jt. Exh. 8A.) Trussoni explained that Paulson had indicated in his application that he had never been injured although the Whitehall records assertedly disclosed that he was injured in a car accident. However, Trussoni, who was not at the employment interview, could not state whether Paulson's denial of an injury was in the context of a work-related injury as opposed to an injury far removed from the workplace. I find that Trussoni's inability to elucidate reflects adversely on his credibility, noting particularly that on the top-righthand portion of the application it is written, "[N]o hire per Pat Trussoni."

Apparently, Respondent's alleged concern regarding the accuracy of Paulson's application was not a factor *vis-a-vis* the application of Cynthia Bloom. Trussoni testified that Bloom was then employed at Wisconsin Beef Industries (W.B.I.) although she failed to include such information on her application. According to Trussoni, the interviewing supervisor generously turned down Bloom for her own good because he believed that the job at W.P.C. would only last 6 months whereas the job at W.B.I. might be "a more permanent situation." Trussoni represented this as "the only reason I know of why she wouldn't have been hired."

While the record discloses that W.P.C. eventually hired two or three of the locked-out Whitehall employees, I find that Respondent's action in this regard was essentially self-serving, coming as it did long after W.P.C. emerged operational and after charges had already been filed in circumstances where Respondent had already assured itself of a great numerical majority of former Landy-Teamsters employees *vis-a-vis* its hiring practices.

In sum, I find that Respondent at all times material herein refused to hire Whitehall employees for employment at W.P.C. in violation of Section 8(a)(3) and (1) as alleged.

c. *The discharges*

The General Counsel contends, in essence, that Whitehall constructively discharged its locked-out employees at the time W.P.C. emerged operational. While I have found that Respondent wrongfully and unlawfully denied employment opportunities to Whitehall employees at W.P.C., I do not find that Respondent's conduct in the circumstances of this case is tantamount to discharging these employees.

It is noted that in August, at the time Whitehall locked out its employees, it was still financially able to maintain operations. Thus, Peters testified that he knew of no impediment to Whitehall's acquiring sufficient funding for that Company to continue to operate. Petranech testified credibly and without contravention that Whitehall representatives at a negotiating session in January 1979 "expressed desires" of reopening the Whitehall facility and discussed a method of recalling employees. While the parties had not arrived at an agreement, the potential existed at all times material herein for the plant to resume operations. Whereas W.P.C. liquidated its assets and no longer exists as a viable entity, this was not the situation *vis-a-vis* Whitehall. The facility and machinery at Whitehall remain essentially intact. This equipment was inspected by Ramis as recently as a month before the instant hearing closed.[26] In these circumstance, and noting that Respondent has not hired any replacements to service the Whitehall facility, I find that the General Counsel has not established by a preponderance of the credible evidence that Respondent has discharged its employees in violation of Section 8(a)(3) and (1) of the Act. Accordingly, I shall dismiss this allegation.

4. The 8(a)(2) allegations

It is undisputed that at all times material herein the Union was the exclusive bargaining agent for Whitehall's unit employees. For reasons noted previously, I have found that Whitehall unlawfully failed to bargain with the Union concerning the decision to create W.P.C. and the effects resulting therefrom. The General Counsel, citing *Jack Lewis and Joe Levitan d/b/a California Footwear Company*, 114 NLRB 765 (1955), enfd. 246 F.2d 866 (9th Cir. 1957), and *Helrose Bindery, Inc. and Graphic Arts Finishing, Inc.*, 204 NLRB 499 (1973), contends that Respondent's failure to bargain about the effects gives rise to the presumption that if given the opportunity a majority of Whitehall's unit employees would have elected to accept positions at W.P.C.'s leased quarters in Eau Claire. According to the General Counsel, as Respondent failed to rebut the presumption, the Union, and not the Teamsters, should be deemed the exclusive bargaining agent for the unit employees at W.P.C. at all times material herein.

Respondent, on the other hand, contends that W.P.C. was the "successor" to Landy and, as such, it was lawfully obligated to accord exclusivity to the Teamsters as the bargaining agent for W.P.C.'s employees. Respondent cited *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders Union, AFL-CIO*, 417 U.S. 249 (1974), *vis-a-vis* its "successorship obligations," pointing out that a "substantial majority" of W.P.C.'s employees were hired under the terms of the Landy-Teamsters contract. As noted heretofore, Respondent also asserts that Landy condi-

[25] It is also noted that W.P.C. did not expressly assume the Landy-Teamsters contract until October 31 (G.C. Exh. 40), 2 weeks after Burchell submitted his application.

[26] Ramis testified that he observed, *inter alia*, a box and glue machine which belonged to Whitehall but was used by W.P.C. at the time the latter Company was operational.

tioned the lease on W.P.C.'s succeeding to it in its bargaining relationship with the Teamsters.

An examination of the circumstances which culminated in Teamsters recognition convinces me that W.P.C.'s actions were dictated solely by self-interest rather than lawful considerations. For example, I have previously discounted Respondent's assertion that Landy insisted that W.P.C. deal with the Teamsters as a condition to the lease, noting, *inter alia*, the absence of any reference in the document *vis-a-vis* obligations to the Teamsters. In fact the lease expressly disclaims creating any relationship other than what is delineated in the document itself. (G.C. Exh. 104, art. XV, p. 9.) Insofar as Landy may have orally conditioned the lease as contended by Respondent, it is noted that this, too, is incompatible with the terms of the lease wherein the document states, *inter alia*, "This lease contains the entire agreement between the parties hereto and cannot be changed or terminated except by written instrument executed by them." (*Id.* at art. XVI, §16.1, p. 9.) There is no evidence tending to establish that Landy ever contemplated resuming its business operations. Thus, the circumstances surrounding the sudden 1-year extension to the Landy-Teamsters contract, which was quickly negotiated and executed at an airport (some 7 months after the shutdown), are highly suspicious and tend to provide further credence to the General Counsel's contention that Whitehall was involved in a scheme to secure Teamsters recognition at the expense of the Union. In this connection it is noted that the extension incorporated by reference any lease of the Eau Claire facility during the month of October. It would appear that, if Landy insisted on Teamsters recognition as contended by Respondent, the extension need not have specified a time frame unless it was for the benefit of Respondent which was then actively negotiating the lease.

In view of the foregoing and noting the haste with which Respondent received the Teamsters (even before W.P.C. became operational) coupled with its failure to provide relevant information to the Union *vis-a-vis* W.P.C., I am persuaded that Respondent under the guise of a successor elected voluntarily to substitute the Teamsters for the Union which it determined was too expensive a bargaining partner.[27]

As noted above, Respondent, citing *Howard Johnson*, also relied on the fact that a "substantial majority" of the employees hired to work at the Eau Claire facility were former Landy employees covered by the Landy-Teamsters contract. In the circumstances of this case, however, the fact that a substantial majority were Teamsters members is not decisive particularly given the additional fact that Respondent unlawfully failed to bargain about the effects of the relocation. Thus, it is not possible to discern whether a representative complement of Whitehall employees would have elected to transfer if given the option or whether the Union otherwise might have mustered majority support at the W.P.C. facility. Of overriding significance is the finding that W.P.C. is essentially nothing more than Whitehall's *alter ego* and Respondent's overall conduct must be viewed in that context. Cf. *Howard Johnson, supra* at 259, fn. 5, where the Court significantly observed, "It is important to emphasize that this is not a case where the successor corporation is the 'alter ego' of the predecessor, where it is 'merely a disguised continuance of the old employer.'"

Respondent cannot unlawfully deprive employees of employment opportunities and then maintain the bootstrap argument that it is a "successor to another company because [it] hired that company's employees." *Rushton & Mercier Woodworking Co., supra* at 125. In sum, I find that Respondent recognized the Teamsters at a time when that Union was not the exclusive bargaining agent for the W.P.C. employees and that Respondent thereby violated Section 8(a)(2) and (1) of the Act as alleged.

[27] In contrast with the Whitehall-Union contract, the Landy-Teamsters contract, *inter alia*, does not provide for incentive pay and has lower starting pay rates. (G.C. Exhs. 48 and 52.)

CONCLUSIONS OF LAW

1. Respondent Whitehall Packing Company, Inc., and W.P.C., Ltd., its *alter ego* for purposes of the Act, constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union No. 73, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. General Drivers and Helpers Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. All production and maintenance employees employed by Respondent, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, are a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times relevant to this case, the Union has been and is now the exclusive collective-bargaining representative of the employees in the unit described above within the meaning of Section 9(a) of the Act.

6. By failing to bargain with the Union over the decision to create W.P.C. and the effects flowing therefrom, by assuming on October 31, 1978, the collective-bargaining agreement between Landy of Wisconsin, Inc., and the Teamsters, by recognizing the Teamsters as the exclusive collective-bargaining agent for the employees employed by W.P.C. at quarters leased from Landy in Eau Claire, Wisconsin, by refusing and failing to offer employment opportunities to employees employed by Whitehall to work at the aforesaid Eau Claire facility, by refusing to hire Whitehall employees to work for W.P.C. at the aforesaid Eau Claire facility, by maintaining the lockout at Whitehall when W.P.C. emerged operational, and by shutting down operations at the aforesaid Eau Claire facility without providing notice to the Union, Respondent thereby has violated Section 8(a)(1), (2), (3), and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Other than as set forth above, Respondent has not violated the Act as alleged.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed and refused to bargain with the Union over its decision to create W.P.C., as well as the effects of that decision, and having further found that Respondent's lockout of Whitehall's employees was converted from permissible to unlawful on November 6, at which time W.P.C., Whitehall's *alter ego*, emerged operational, I shall recommend that Respondent restore the *status quo ante* by, *inter alia*, being ordered to end the lockout and to reopen the Whitehall facility and to recall the unlawfully locked-out employees and to make them whole in the manner set forth below. See, e.g., *Frito-Lay, Inc.*, 232 NLRB 753, 755–756 (1977).

The record provides persuasive evidence tending to show that reopening the Whitehall facility would not be unduly burdensome insofar as restoring all phases of the Whitehall operations with the exception of the "kill floor." For example, Peters admitted that Whitehall at the time of the lockout was financially able to continue its operations. In effect that is what transpired given the finding herein that W.P.C. was essentially nothing more than a disguised continuance of Whitehall and, as such, its *alter ego*. However, the record also discloses that by July 1979 W.P.C. liquidated its assets and ceased to exist as a viable entity. In contrast, the Whitehall facility with its machinery and inventory, including the equipment returned from W.P.C., appears to be intact. In these circumstances it does not appear that resuming the boning operations would work an undue hardship on Respondent. Cf. *Production Molded Plastics, Inc. and Detroit Plastic Molding Co.*, 227 NLRB 776, 778 (1977).

On the other hand, the evidence tends to indicate that it was unlikely that Whitehall was ever going to resume its kill floor operations even if Respondent acquired the funding contemplated. In these circumstances, noting particularly that the lockout did not become unlawful until W.P.C. emerged operational and even so that it was not involved in kill floor operations, I shall recommend that Respondent not be compelled to resume said kill floor operations. In the event the kill floor operations are not resumed, I shall recommend that Respondent bargain with the Union about the effects thereof. In this connection the record discloses that Respondent offered to bargain with the Union about integrating kill floor employees with employees involved in the boning operations. (G.C. Exh. 20.)

While I have also found that Respondent, in violation of Section 8(a)(3), failed to provide employment opportunities to Whitehall employees for positions at W.P.C. when that Company emerged operational on November 6, given the uncertain standing of kill floor employees as noted above, I shall recommend a make-whole remedy under Section 8(a)(5) to effectuate the purposes of the Act. Accordingly, I shall recommend that Respondent pay the locked-out employees backpay at the rate of their normal wages as of November 6 until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to its decision to preserve the lockout by creating, operating, and finally closing W.P.C., and the effect of those decisions and acts on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of its receipt of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union about the matters described hereinabove; or (4) the subsequent failure of the Union to bargain in good faith. See, e.g., *Walter Pape, Inc.*, 205 NLRB 719, 720–721 (1973); *Production Molded Plastics, supra*. Where backpay is required it will be paid with interest on the amounts owing, and computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]